Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JOSE GRACIA and MARY GRACIA, Individually and on Behalf of the Estate of JOSE ANGEL GRACIA, III, a Deceased Child and as Next Friends of MONICA GRACIA, ADAM GRACIA and CHRISTOPHER GRACIA, Minor Children,

Petitioners,

v.

RAUL TREVINO, Individually and as Executive Director of the Housing Authority of the City of Brownsville, GENOVEVO RUBALCABA, Individually, and as Supervisor of Maintenance of the Housing Authority of the City of Brownsville, and the HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Texas Tort Claims Act grant immunity to municipalities and their policy-making officials in the operation of Housing and Urban Development low-cost housing projects, such as the Brownsville Housing Authority of Brownsville, Texas, where such officials under the color of State law subjected or caused to be subjected guests of a tenant of said Brownsville Housing Authority (BHA) to the deprivation of 42 U.S.C.A. section 1983 civil rights secured by the Constitution, federal and Texas State laws where:

(a) municipal housing authorities are not immune from section 1983 civil rights claims; *Monell v. New York City Dept. Soc. Services*, 436 U.S. 658, 690, 691 (1977); *Board of Commissioners of Bryan County, Okla. v. Brown*, 117 S.Ct. 1382 (1997); *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989);

(b) the Brownsville Housing Authority (BHA) was not covered by the Texas Tort Claims Act on the date of the occurrence either by:
(i) statute; Texas Local Government Code Annotated section 392.011(b); Housing Authorities Laws of Texas, article 1269k sections 7 and 8; or
(ii) case law; *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931); *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (1884); *White v. Bolner*, 223 S.W.2d 686 (Tex. Civ. App. – San Antonio 1949, writ ref'd); *Housing Authority of Dallas v. Higginbotham*, 135

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Tex. 158, 143 S.W.2d 79 (1940); *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155 (1993);

(c) if BHA were covered by Texas Tort Claims Act on date of occurrence, exemptions of the Act removed it; Tex. Civ. Prac. & Rem. Code Ann. Sections 101.021(2), 101.0215 (Vernon 1997); Texas Local Government Code Annotated section 392.006 (Vernon Supp. 1997); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30 (Tex. 1983); *Board of Commissioners of Bryan County, Okla. v. Brown*, 117 S.Ct. 1392 (1997); *Brown & Root, Inc. v. City of Cities Mun. Util.*, 721 S.W.2d 881 (Tex. App. – Houston [1st Dist.] 1986, no writ);

(d) the BHA lease confers the same leasehold rights, privileges, and immunities on guests as it does on tenants under both federal and Texas State law; *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. City of Roanoke Hous. Auth.*, 479 U.S. 418 (1986); *Hafer v. Melo*, 502 U.S. 21 (1991); *Parker v. Highland Park Inc.*, 565 S.W.2d 512 (Tex. 1978); *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex. 1972); *Erie Ry. v. Tomkins*, 304 U.S. 103 (1939); *Hafer v. Melo*, 502 U.S. 21 (1991); *Comeaux v. T.L. James Co.*, 702 F.2d 1023 (5th Cir. 1983).

LIST OF PARTIES

The parties to the proceedings below were the appellants, JOSE GRACIA and MARY GRACIA, Individually and on Behalf of the Estate of JOSE ANGEL GRACIA, III, a Deceased Child and as Next Friends of MONICA GRACIA, ADAM GRACIA and CHRISTOPHER GRACIA, Minor Children, and the appellees, RAUL TREVINO, Individually and as Executive Director of the Housing Authority of the City of Brownsville, GENOVEVO RUBALCABA, Individually, and as Supervisor of Maintenance of the Housing Authority of the City of Brownsville, and the HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Jose Gracia, et al., residents of the State of Texas, pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 105 F.3d 1053. The opinion of the district court (Appendix B) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on February 14, 1997. (Appendix A). A timely application for rehearing en banc was requested on February 28, 1997, and the petition for rehearing en banc was denied on April 23, 1997. (Appendix C). This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

United States Constitution, article VI, clause 2.
United States Constitution, Fourteenth Amendment.
28 United States Code § 1254(1) (1993).
42 United States Code § 1983 (1994).

24 Code of Federal Regulations:

> § 966.4(d), lease shall include reasonable accommodations of tenant's guests and visitors;
>
> § 966.4(e)(1)-(4) (1990), leased premises must be maintained in decent, safe and sanitary condition; comply with all building and housing codes and HUD regulations materially affecting health and safety; make necessary repairs to premises; and keep facilities and common areas in clean and safe condition;
>
> § 966.6(c) (1990), forbids exculpatory clauses in the lease;
>
> § 968.115(b) (1990), preventive maintenance.

Texas Housing Authorities Law, Tex. Loc. Gov't. Code Ann. § 392.001 et seq.,

> § 392.011 (Vernon 1988), authorized the City of Brownsville to establish a housing authority which it did on March 24, 1938;
>
> § 392.031(a) (Vernon 1988), authorized the City mayors to appoint five commissioners, who with the Executive Director constitute the Brownsville Housing Authority;
>
> § 392.041(a)-(h) (Vernon 1988), the mayor has the exclusive authority to remove commissioners for incompetence, inefficiency, and negligence;
>
> § 392.006 (Vernon Supp. 1997), governmental immunity was not conferred on housing authorities until August 28, 1989.

Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq.,

§ 101.021(2) (Vernon 1997), governmental units are liable for personal injury and death caused by a condition or use of tangible personal or real property.

§ 101.0215(a)-(c) (Vernon 1997), conferring immunity on 33 municipal functions but not including housing authorities.

Texas Housing Authorities Law, Tex. Civ. Stat. Ann. art. 1269k §§ 7, 8 (Vernon 1937).

Texas Tort Claims Act, Tex. Rev. Civ. Stat. Ann. art. 6252-19 § 3 [cited in *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30 (Tex. 1983).]

STATEMENT OF THE CASE

A. The Occurrence:

On July 24, 1988, as children sat in a hammock during a summer cookout, a tree suddenly collapsed, fatally injuring Jose, age 11, and inflicting irreparable brain injury and physical paralysis on Monica, age 2. These petitioners were guests of Ezequiel Gracia, their great-grandfather, at a family gathering adjacent to his home apartment at Unit 15 of the Victoria Gardens, a section of the Brownsville Housing Authority (BHA), where he was a leasehold tenant. (Appendix D). Petitioners, Jose Gracia, age 11, Monica Gracia, age 2, and Adam Gracia, age 6, siblings, along with a young cousin were sitting in a hammock awaiting a picnic dinner. For many years this hammock had been strung between two trees, one of them a large, heavy avocado tree some twenty-feet tall. This tree had been topped and all the branches, being

dead, stripped off with a rope by a member of the BHA maintenance crew months before, leaving a naked pole.

The Brownsville Housing Authority (BHA) was established by Resolution of the City of Brownsville, Texas to provide low-cost public housing for residents of the city on March 24, 1938, (Appendix E), as authorized by Tex. Loc. Gov't. Code Ann. section 392.011 (Vernon 1988). Respondent Raul Trevino was, and had been, the Executive Director of BHA from 1980 and prior to that Executive Director at Laredo, Texas from 1944 to 1980. He is the chief executive officer of the project with power and control over all maintenance, welfare and safety of the grounds, tenants and others on the project. The corresponding duties and responsibilities that attach to his status are set out in federal regulations 24 C.F.R. sections 966.4(d), (e)(1)-(4), 966.6(c), 968.115(b) (1990); the BHA Texas Manual of Operations, Maintenance (Appendix F), and Job Descriptions (Appendix G). The BHA Texas Manual of Operations dealing with maintenance and the job descriptions of the executive director and superintendent of maintenance were prepared by respondent Trevino himself and approved by the HUD regional director. (Appendix H). Between the time the maintenance manual was approved by the HUD regional director in 1983 and the collapse of the avocado tree in 1988, the respondents conducted only one inspection of Unit 15. The manual requires routine, ground maintenance including trees, (Appendix F) and preventive maintenance of the grounds at a minimum of twice a year. (Appendix F). The Executive Director, respondent Trevino, admitted that had the avocado tree been properly inspected following the severe freeze of 1983, the respondents would have known

it was dead. (Record, Video Taped Deposition "VTD" at 189; L7-25 at 190; L1-15 at 192; L4-9). Respondent Trevino also admitted that the dead condition of the tree went undetected because neither he nor maintenance superintendent, respondent Rubalcaba, nor their crew properly inspected its condition. Regardless of whether the BHA is or is not covered within the Texas Tort Claims Act, the policy maker and executive administrators of the housing authority, the respondents, cannot deprive the petitioners of their Fourteenth Amendment constitutional rights to life, liberty, and property, and equal protection of the law in conducting their legally required functions of office.

B. Proceeding Below:

Suit was filed initially in state court in Cameron County, Texas, for violation of petitioners' rights under Texas landlord/tenant laws and removed to the United States District Court of the Southern District of Texas, Brownsville Division, when the federal charge of liability under 42 U.S.C. section 1983 (1982) was added. The defendants were Brownsville Housing Authority (BHA); the City of Brownsville; Raul Trevino, individually and as Executive Director of the BHA; and Genovevo Rubalcaba, individually and as Superintendent of Maintenance of BHA. On March 4, 1993 respondent BHA filed motions to dismiss for failure to state a claim, for summary judgment as to the section 1983 claims, for summary judgment for its defense of sovereign immunity, and for judicial notice of limited liability. On August 18, 1993 the district court denied all motions of BHA. (Appendix I). On December 15, 1993 petitioners filed their Joint Pretrial Order. Respondents presented theirs on March 3, 1994, the day

before trial began. Both filings were noted in the Record on the dates filed but not included. Prior to trial the City of Brownsville settled with petitioners. Trial commenced on March 4, 1994. At the close of evidence the court stated the nature of its charge to the jury, stating that at the conclusion of its presentation the parties could object and argue. The respondents immediately objected to the charge in that it restricted consideration of their section 1983 claim by first requiring an affirmative jury finding to the state claim interrogatory where such was limited to respondents', Trevino and Rubalcaba, actually knowing that the avocado tree was dead. Petitioners also filed a Supplemental Objection to the court's main charge on March 18, 1994. (Appendix J). The jury returned its verdict based on a negative answer to the first interrogatory concerning the state claim on March 21, 1994. The court then entered judgment on May 4, 1994 (Appendix B), in favor of BHA and Raul Trevino and Genovevo Rubalcaba in their official capacities. Upon motion during pendency of the trial, the court granted directed verdict and judgment in favor of respondents Raul Trevino and Genovevo Rubalcaba in their individual capacities only. The petitioners were adjudged to take nothing and ordered to pay costs. The petitioners' section 1983 federal civil rights claim was never presented for the jury's consideration but was disposed of by erroneous submission of state law as applied to a business licensee on lessor's property. Even error free state law does not preempt federal law. The petitioners were entitled to an independent submission of their federal section 1983 claims and expressed their objections immediately when the court's charge was announced.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Is Important:

The Fifth Circuit Opinion, *Gracia v. Brownsville Hous. Auth.*, 105 F.3d 1053 (5th Cir. 1997), negates federal sovereignty embodied in federal law and in the Fourteenth Amendment to the Constitution which prohibits depriving a person of life, liberty, or property, without due process of law, by conferring immunity on state agencies or municipalities through state law.

II. Municipal Housing Immunity From 42 U.S.C. § 1983 Civil Rights Claim:

This Court held in *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978) that municipalities do not have absolute immunity to violate constitutional rights or even suggest that such violations are anything but wrong. *Id.* at 700. The Court stated that the remedy was to be broadly construed against all forms of official violation of federally protected rights, and there is no justification for excluding municipalities from the "persons" covered in section 1983. Municipalities cannot be entitled to absolute immunity under section 1983. *Id.* at 700-701.

The United States Fifth Circuit based its opinion on the ground that the Texas Tort Claims Act afforded complete immunity to the BHA at the time of the accident. That, therefore, the guests of the tenant were licensees, and if the respondents did not have actual knowledge of the danger posed by the tree they owed no duty of care to the petitioners. *Gracia v. Brownsville Hous. Auth.*, 105 F.3d 1053, 1055, 1056 (5th Cir. 1997).

While the recent case of *Board of Commissioners of Bryan County, Okla. v. Brown*, 117 S.Ct. 1382 (1997) concludes that under the facts of that case a section 1983 violation did not lie, the opinion presents a historic and legal exposition of the theory and facts that must be tendered to sustain a section 1983 civil rights claim. The petitioners cause meets the criterion required by the *Bryan County* case. For petitioners to impose section 1983 liability, it is necessary to establish a municipal "policy" or "custom" that caused the alleged injuries. A municipality may only be held liable for those deprivations resulting from decisions of its legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Id.* at 1388 (citing *Monell*, 436 U.S. 694); *Pembauer v. Cincinnati*, 475 U.S. 469, 480-481 (1986); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). The petitioners had to show that the municipal action was taken with a requisite degree of culpability that demonstrates a direct causal link between the act and the deprivation of federal rights. *Bryan County*, 117 S.Ct. at 1388. (Appendix A).

Proof that the action taken or directed by the municipality or its authorized decision maker violates federal law determines that the municipal action was the moving force behind the injuries complained of. *Bryan County*, 117 S.Ct. at 1389. The authority of the Executive Director, Raul Trevino, and Maintenance Superintendent, Genovevo Rubalcaba, respondents, is set out in the City Resolution creating the BHA, (Appendix E), 24 C.F.R. section 966.4(d), (e)(1)-(4), section 966.6(c) covering the rights of tenants, their guests and visitors under the regulations and lease, HUD standards, on maintenance and safety, the BHA Manual of Operations, Maintenance

(Appendix F), and Job Descriptions (Appendix G), which manual HUD area manager Finnes Jolly was urging the Executive Director to prepare since 1981 concerning preventive maintenance inspections of the grounds, buildings and equipment for the safety of tenants, visitors and workers on the project. The director finally put the Maintenance Plan in writing in 1985, but even then he did not follow it or inspect the area of the occurrence in 1988 until the tragedy had taken place. On VTD the director admitted that if he and his superintendent had been maintaining the semi-annual preventative inspections his own maintenance plan required during those three (3) prior years, they would have detected the deadly and dangerous tree before it fell. By both federal and state law, they were obligated to protect petitioners' Fourteenth Amendment constitutional rights against deprivation of life, liberty and property. They failed to obey the legally mandated inspection laws, but as in the *Pembauer* case, where the deputies forcibly entered the petitioner's office acting on the decision-making authority of the county prosecutor, the respondents here ignored the laws specifically directed, resulting in the deprivation of petitioners' rights. *Bryan County*, 117 S.Ct. at 389 (citing *Pembauer*, 475 U.S. at 481); *Canton*, 489 U.S. at 388. Where the decision maker's action was not simple negligence but was taken with "deliberate indifference" as to known or obvious consequences, liability attaches. The trial court's charge to the jury on the petitioners' federal question identified the Executive Director and the Maintenance Superintendent as policy-making "persons" acting under the color of state law. Court's Charge (Appendix K). Once the policy-making official has been identified as to a

particular issue, it is for the jury to determine whether the decisions have caused the deprivation of rights at issue. *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989), cited by *Bryan County*, 117 U.S. at 1390. As Justice O'Conner points out in *Jett*, the trial court did not have the benefit of that ruling at the time of trial. 491 U.S. at 737, 738. Here both the trial court and the Fifth Circuit were aware of the ruling, but the federal cause of action was never submitted for the jury's consideration.

III. The Brownsville Housing Authority was not covered by the Texas Tort Claims Act on the date of the occurrence, either by statute or case law:

The Supreme Court of Texas established the state liability law of municipalities relative to the conduct of its operations in *City of Galveston v. Posainsky*, 62 Tex. 118, 125-126 (1884). Where a municipality incurs an obligation with its consent, expressed or implied, as is the case of the City of Brownsville establishing the BHA by City Resolution under the Housing Authorities Law, Tex. Loc. Govt. Code section 392.011(a), (b) et seq. (Vernon 1988), it is subject to the same liabilities for the neglect of its obligations as private corporations would be if the same duties and authority were conferred on them. *Posainsky*, 62 Tex. at 126. For acts done essentially for the advantage of the inhabitants of the corporation and in the management of property or rights voluntarily held for the corporation's profit or advantage, violations of those duties incur liability. *Id.* at 127, 131. The first housing law in Texas was the Texas Housing Authorities Law, Tex. Civ. Stat. Ann. art. 1269k (Vernon 1937).

Section 8 of the act, defining the powers of an authority, are set out as "a public body, corporate and politic, exercising public and essential governmental functions." *See, Housing Auth. of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 83 (1940). This identical language is used when the Texas Housing Authorities Law is transposed to the Texas Loc. Gov't. Code Ann. section 392.011(b). This initial language and *Posainsky* are again early addressed in *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931). Where the functions of the municipality are intended primarily for the benefit of those within the corporate limits, as here, the court adopts the *Posainsky* position that the function is proprietary and thus liability attaches to violation. *Ware*, 40 S.W.2d at 60. To the same effect is *City of Houston v. Shilling*, 150 Tex. 387, 240 S.W.2d 1010, 1011 (1951).

The 70th Legislature that enacted the Housing Authorities Law in 1987 also enacted the Texas Tort Claims Act section 101.001 et seq., Tex. Civ. Prac. & Rem. Code Ann. In an effort to clear up the confusion between municipal governmental and proprietary functions, the Legislature enacted section 101.0215, (effective Sept. 2, 1987), the day after the effective date of the Housing Authorities Law. Under section 101.0215(a) the Legislature listed thirty-three (33) municipal functions that would be considered governmental. Housing, housing authorities or housing projects were not mentioned. Not until August 28, 1989 did the 71st Legislature amend the Texas Housing Authorities Law declaring housing authorities governmental functions and not proprietary functions subject to the Texas Tort Claims Act. Tex. Loc. Gov't. Code Ann. § 392.006. The date of the deprivation

of petitioners' constitutional rights was July 24, 1988. The initial 1937 Housing Authorities Law and its later reenactment in the Local Government Code continued the same language as interpreted by the Supreme Court of Texas concerning municipal proprietary functions. A change in the housing status was not enacted by the Texas Legislature until 1989 when it adopted Tex. Loc. Gov't. Code Ann. section 392.006.

The Court is under the misconception that the Texas Legislature created the housing authority as an entity independent of the city and that the city's power was limited to activating the housing authority. *Gracia v. Brownsville Hous. Auth.*, 105 F.3d at 1056. (Appendix A). The Housing Authorities Law itself does not support that reading of section 392.041(a)-(h). This language is the same as that set out in the predecessor statute. Tex. Civ. Stat. Ann. art. 1269k § 7 (Vernon 1937); *White v. Bolner*, 223 S.W.2d 686, 688 (Tex. Civ. App. – San Antonio 1949, writ ref'd). There commissioners of the San Antonio Housing Authority were removed from office by the mayor for inefficiency and neglect of duty – others were appointed in their place. The ousted members sought restraining orders and injunctions. The trial court granted temporary injunction. The appeals court reversed. The appeals court held that "the Mayor and no one else has the power to remove housing commissioners and there is no alternative provision for the power to be exercised by anyone else. . . . " Far from being independent of the city, the commissioners are answerable to the mayor as any other subordinate agent. *Id.* at 689.

The Texas Supreme Court recognizes that Congress may preempt state law when acting within constitutional

limits under article VI, clause 2 of the United States Constitution, either by express terms or by inference from its comprehensive regulation of an area. *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155, 158 (Tex. 1993). Where compliance with both state and federal law is impossible or the state law stands as an obstacle to the full purposes and objectives of Congress, preemption is authorized. *Id.* at 158. Clothing a municipal act with immunity from violations of constitutional civil rights defeats the full purposes and objectives Congress intended for section 1983 claims. Petitioners should be awarded a new trial so their federal section 1983 claims can be determined by a jury.

IV. Exemptions Removed Brownsville Housing Authority from Texas Tort Claims Act.

Moreover, the initial Texas Tort Claims Act, Tex. Rev. Civ. Stat. Ann. art. 6252-19, section 3 created liability for municipalities for death or personal injuries for causes "from some condition or some use of tangible property, real or personal," under circumstances where the government unit would be liable to the claimant, if a private person or corporation. *Salcedo v. El Paso Hosp.*, 659 S.W.2d 30, 31 (Tex. 1983). There the hospital district, which was held to be performing a governmental function in other respects, was sued by the claimant widow for causing the death of her husband through its agents and employees misuse of and failure to use intravenous, oxygen, and cardiac monitoring equipment and misinterpreting the graphs and charts produced by the equipment. The hospital excepted on the ground the pleadings failed to allege the injuries were caused from some condition or

use of tangible property furnished in a defective condition. The trial court held the claim did not come within any exception to the hospital's general immunity, and the court of appeals affirmed. The Texas Supreme Court reversed and remanded. The Court held that while some allegation of defective condition can be a contributing factor to the injury, liability can also attach from some use of tangible property, real or personal, where such unit, if a private person, would be liable. *Id.* at 32. The Court then held it is not necessary to allege a defective condition of the property if "some use" of the property, rather than "some condition" is alleged to be a contributing factor to the injury. *Id.* at 32; *Brown & Root, Inc. v. City of Cities Mun. Util.*, 721 S.W.2d 881, 884 (Tex. App. – Houston [1st Dist.] 1986, no writ). The exact language of the exemption set out at section 3 of the initial Texas Tort Claims Act is included in the Act in force on the date of the occurrence. Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq., § 101.021(1), (2) (Vernon 1997). In addition, as stated above, at the time in question housing authorities were exempt under Tex. Civ. Prac. & Rem. Code Ann. section 101.0215(a)-(c) and were not removed until the enactment of Tex. Loc. Gov't. Code section 392.006 in 1988. The alleged misuse of tangible real property in the infliction of the injuries and damages provide the exemption permitting the submission of liability to a jury. At this point *Salcedo* held the claimant must show there is proximate cause between the negligent or wrongful act or omission of some agent or employee from some condition or use of tangible property where private liability would likewise lie. *Salcedo*, 659 S.W.2d at 32-33. This is the same standard set in *Bryan County*, where the Court

requires the determination that the action taken or directed by the municipality or its decision maker violates federal law and is the moving force behind the injuries complained of. 117 S.Ct. at 1389. Here the decision makers admitted they did not follow their own standards of preventative inspections to maintain the safety of the premises and that they were aware that such neglect could lead to the collapse of trees and injuries. The petitioners are entitled to a jury determination of their section 1983 claims.

V. Under both federal and state law the Brownsville Housing Authority lease confers the same leasehold rights, privileges and immunities on guests as it does on the tenants:

In its opinion the Fifth Circuit found that the Fair Housing Act and its regulations did not confer any enforceable rights on the visiting petitioners as they alleged. This is contrary both to the federal statutory and case law interpreting the Act and its regulations and contrary to the Texas State law on landlord/tenant leases. The opinion states it is not clear that regulations can be considered "law". A violation of a regulation in the Code of Federal Regulations has been held to be prima facia evidence of the original test and is required to be judicially noticed. *Wei v. Robinson*, 246 F.2d 739, 743 (7th Cir. 1957), *cert. den.*, 355 U.S. 879 (1957). The BHA's obligations under the lease are set out in part at 24 C.F.R. sections 966.4(d), (e)(1)-(4), 968.115(b). At both section 966.4(e)(1) and section 968.115(b) the purpose of the housing authority and its lease is stated to be to maintain

the premises and the project in a "decent, safe and sanitary condition." This includes reasonable accommodation of the tenant's guests and visitors. 24 C.F.R. § 966.4(d). The regulations further forbid any exculpatory clauses in the lease agreement to hold the landlord or his agent clear of liability for negligent or intentional acts or omissions. 24 C.F.R. § 966.6(c).

The recent case of *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498 (1990) explicates the three-part test for a federal statute to create an enforceable right. First, the statutory provisions at issue must show it was intended to benefit the putative plaintiff. 496 U.S. at 509. Here the HUD regulations, manuals, and regional manager Jolly's instructions require BHA, Director Trevino, and Maintenance Superintendent Rubalcaba to keep and maintain safe and decent conditions in the buildings and grounds of the project, including trees by regular and mandatory inspections. These same leasehold requirements are contained in the municipal ordinances and building codes. By lease and Texas State law the rights of the tenant extend to his guests. 24 C.F.R. § 966.4(d), (e); *Parker v. Highland Parks, Inc.*, 565 S.W.2d 512 (Tex. 1978). The tenant and his guests would be foremost in the objective of keeping safe conditions. Second, the provisions reflect more than a congressional preference. The conduct required of the defendant housing project and officials is couched in mandatory terms – that they shall comply with building codes, housing codes and HUD regulations affecting health and safety, section 966.4(d)(2); and shall keep the common facilities and areas in a clean and safe condition, section 966.4(d)(4). These provisions set forth

more than preferences. They are understandable, obtainable urban housing conditions. Third, these are not vague conditions but are within the competence of the judiciary to enforce. HUD standards state that the BHA must provide adequate maintenance and annual inspections.

Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987) involved the right of an individual covered by a housing authority lease to enforce a state deprivation of a "right" secured by federal section 1983. The Court held in the affirmative, citing *Maine v. Thiboutot*, 448 U.S. 1 (1980). There the tenants alleged the Roanoke housing project by accounting methods was charging in excess of the maximum rental allowed in deprivation of their property rights secured by federal law section 1983. The housing authority made the same defense the respondents are making here: that the provisions of 24 C.F.R. section 966.4 need only be included in the lease and that it is questionable that the regulations can be considered "law". *Gracia*, 105 F.3d at 1057. Further, *Gracia* held children were not parties to the lease, so the provision of section 966.4 cannot give rise to a section 1983 action. *Id.* at 1057-1058. Here the deprivation of rights complained of are the loss of life and limb, the loss of enjoyment of life and of property. These rights and privileges secured by the Constitution and laws to guests of a low-cost housing project tenant may also be redressed by action at law or in equity by the injured party. *Wright* held that before private enforcement can be foreclosed Congress must indicate the enforcement authority was vested solely in HUD. 479 U.S. at 424, 425. Concerning the administration of the leases and the rent thereunder, the Court found enforcement authority was not centralized in

HUD and private action was anticipated. The Court further found that these rights were not beyond the competency of the judiciary to enforce, and the fact the party had a state right of action did not foreclose section 1983. *Id.* at 429, 432.

The premises law in Texas is that the duty the landlord (BHA) owes to its tenants extends to their guests (petitioners). *Parker*, 565 S.W.2d at 514, 515 (citing with approval Restatement (Second) of Torts, sections 360 and 361); *Baker v. Pennoak Prop., Ltd.*, 874 S.W.2d 274, 275 (Tex. App. – Houston [14th Dist.] 1994, no writ). Where the lessor (BHA) retains a portion of the leased premises under its contract which is necessary to the safe use of the leased part, the landlord is subject to liability to his tenant and others lawfully upon the land with the consent of the tenant for harm caused by a dangerous condition existing on the retained, controlled portion. To recover for such loss the claimant (petitioners) must prove that the lessor (BHA) knew or in the exercise of reasonable care should have known of the dangerous condition. *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 454, 455 (Tex. 1972). The BHA lease requires that the housing authority comply with the local building and housing codes and HUD regulations affecting health and safety for the maintenance of the premises in decent, safe and sanitary conditions. (Appendix D). The Maintenance Operation Plan is to the same effect, (Appendix F), and the HUD federal regulations state that BHA must comply with all state and local health and safety codes, regulations and ordinances. 24 C.F.R. § 966.4(e)(4). The law applicable in petitioners' Texas premises action was that announced by the Supreme Court of Texas in the *Adam*

Dante and *Parker* cases. It was identical with the duty owed the tenant: the duty to know or by the exercise of reasonable care to know of the dangerous condition. Under *Erie Ry. v. Tomkins*, 304 U.S. 103 (1939), the jury should have been so charged on the state claim.

At the conclusion of the evidence, the trial court having charged the jury that the respondents, Executive Director Trevino and Superintendent of Maintenance Rubalcaba, were "acting under the color of state law at the time of the acts complained of," (Appendix K), the petitioners' section 1983 civil rights claims should have been submitted to the jury to determine the culpability of the respondents. *Jett*, 491 U.S. at 737, 738. On the question of personal liability in a section 1983 claim, the claimant need only show that the official acting under the color of state law caused the deprivation of a federal right. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Both the petitioners' state and federal claims should have been submitted independently of each other. Fed. R. of Civ. Proc. 49(a). The Fifth Circuit recognizes and has enforced that rule. *Comeaux v. T.L. James Co.*, 702 F.2d 1023, 1025 (5th Cir. 1983). Where the action taken by the municipality or its authorized decision maker violates federal law, the municipality will be held to be the moving force behind the injury complained of. That is the situation in the case at bar. *Bryan County*, 117 S. Ct. at 1389.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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